

IN THE COURT OF APPEALS OF IOWA

No. 3-1152 / 13-0170
Filed January 9, 2014

ROBERT REED,
Petitioner-Appellee,

vs.

TIMOLIN REED,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Mark J. Smith,
Judge.

A wife appeals from the district court order of protection in a chapter 236
domestic abuse case. **ORDER VACATED.**

Lauren Phelps, Davenport, for appellant.

Robert Reed, Davenport, pro se.

Considered by Vogel, P.J., and Mullins and McDonald, JJ.

McDONALD, J.

Timolin Reed appeals from an order of protection issued pursuant to the Domestic Abuse Act, Iowa Code chapter 236. The order prohibits her from having contact with her husband Robert Reed, and it grants Robert temporary custody of their minor child A.R. Timolin argues that the district court erred in finding that she committed an act of domestic abuse assault and erred in awarding temporary custody of A.R. to Robert. Robert has not filed a brief in this appeal, but we still must address the merits of Timolin's argument.

Robert filed a petition to seek relief from domestic abuse following an incident between him and Timolin occurring on Christmas day 2012. At hearing on the petition, Robert and Timolin each testified. Their testimony regarding the incident was largely similar. Robert and Timolin married in February 2012. They have one child, A.R., who was born in July 2012. On Christmas day, Robert was driving Timolin and A.R. from his sister's house in Davenport to Timolin's grandmother's house. Robert and Timolin began arguing in the car, and Timolin asked Robert several times to pull over to the curb and let her and A.R. out of the vehicle. Robert refused. Robert testified that Timolin then yanked on the steering wheel and almost caused them to get into an accident. Timolin testified that she pulled on the steering wheel to try and get the car to the curb so she could exit the vehicle. After Timolin grabbed the steering wheel a second time, Robert stopped the vehicle and punched her.

After hearing the testimony, the district court found that Timolin committed domestic abuse assault, entered an order of protection, and awarded temporary custody of A.R. to Robert:

The Court finds that based on the testimony the respondent [Timolin] grabbed the steering wheel while the vehicle was moving, creating a hazard not only for herself, but the child. That constitutes an assault under domestic abuse; therefore the Court will issue a permanent final domestic protective order which indicates that, Ms. Reed, you are not to contact Mr. Reed during any time for a period of one year.

Mr. Reed, based on the presumption based on a domestic abuse that you have custody of the child, the Court finds that you have physical custody of the minor child.

Our standard of review of the district court's order depends on the mode of trial in district court. We review civil domestic abuse proceeding tried in equity de novo. See *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). Where, as here, the district court rules on objections as they are made, the case is tried as a law action, and our review is at law. See *Bacon ex rel Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). "In a law action the district court's findings of fact are binding upon us if those facts are supported by substantial evidence. Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings." *Id.* (internal citations omitted).

We conclude that the district court erred in determining that Timolin's creation of a hazard to herself and to A.R. constitutes domestic abuse assault within the meaning of chapter 236. A party seeking a protective order pursuant to chapter 236 must prove by a preponderance of the evidence that a domestic abuse assault occurred. See Iowa Code § 236.4(1) (2013); *Knight*, 525 N.W.2d at 843. "Domestic abuse" means "committing an assault as defined in Iowa Code section 708.1" when the assault is between "family or household members" or the "parents of the same minor child." Iowa Code § 236.3(2). As relevant to the circumstances here, Iowa Code section 708.1(2) defines assault:

2. A person commits an assault when, without justification, the person does any of the following:

a. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.

b. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.

Assault under section 708.1 includes an element of specific intent. *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010). “Intent is a state of mind; it may be established by circumstantial evidence and by inferences drawn from that evidence.” *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995).

The district court did not find Timolin did anything “intended to cause pain or injury to” Robert; intended to result in insulting or offensive physical contact with Robert, or “intended to place [Robert] in fear of immediate physical contact” that would be “painful, injurious, insulting or offensive.” See Iowa Code § 708.1(2)(a)-(b). In short, the district court did not find Timolin committed an assault on Robert. Instead, the district court found Timolin created a hazard to herself and her child. The creation of a hazard to herself and her child does not constitute a domestic abuse assault against Robert, the party seeking relief. Further, the creation of a hazard to the child cannot support a finding of domestic abuse assault within the meaning of chapter 236. See *D.M.H. ex rel Hefel v. Thompson*, 577 N.W.2d 643, 646 (Iowa 1998) (“[D]omestic abuse [under chapter 236] can only occur between family and household members and the law expressly excludes from the definition of family or household members children” of the household members under the age of eighteen).

A finding of domestic abuse assault is a prerequisite to the entry of an order of protection and related temporary custody and visitation orders. See Iowa Code § 236.5 (stating that a district court can provide relief “[u]pon a finding that the defendant has engaged in domestic abuse”). The district court erred in concluding that Timolin’s creation of a hazard to herself and her minor child constituted domestic abuse assault. Therefore, the order of protection entered January 2, 2013, and all subsequent modifications of the same are hereby vacated and without any further force or effect. Timolin’s challenge to the temporary custody and visitation order is moot. See *In re B.B.*, 826 N.W.2d 425, 428 (Iowa 2013) (noting an appeal is moot if the issue becomes nonexistent or academic and, consequently, no longer involves a justiciable controversy).

ORDER VACATED.